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No. 83-1503

In the Supreme Court of the United States

OCTOBER TERM, 1983

JAMES COCKRELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
STEPHEN S. TROTT
Assistant Attorney General
FRANCIS J. MARTIN
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether petitioner was denied his right to effective assistance of counsel at trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 720 F.2d 1423.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1983. A petition for rehearing was denied on January 19, 1984 (Pet. App. B1). The petition for a writ of certiorari was filed on March 12, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on one count of conspiracy, in violation of 18 U.S.C. 371, and on fifteen counts of mail fraud, wire fraud and interstate travel in aid of fraud, in violation of 18 U.S.C. 1341, 1343 and 2314. He was sentenced to a 15-year term of imprisonment. The conviction was affirmed on direct appeal. *United States* v. *Becker*, 569 F.2d 951 (5th Cir.), cert. denied, 439 U.S. 865 (1978). Following his conviction and appeal, petitioner filed a motion under 28 U.S.C. 2255 to vacate his sentence, asserting that he had been denied effective assistance of counsel. The district court denied relief (Pet. App. D1-D11), and the court of appeals affirmed (Pet. App. A1-A12). Petitioner now has been released on parole (Pet. 3).

1. The evidence at trial showed that petitioner and his co-conspirators engaged in a complex scheme to induce investments in the mining of silver and other precious metals from low grade ore. Petitioner's involvement in the scheme centered on the demonstration of the "secret Henderson process," which reputedly extracted exceptionally high amounts of silver at low costs. Petitioner's demonstration and report claimed a recovery yield five times greater than he had ever achieved. The government contended at trial that the ore and the extraction process actually were of little value and that the demonstration was conducted in order to dupe potential investors. Petitioner's involvement in the fraud was corroborated by his financial arrangement with co-conspirator David McCord. Petitioner worked for McCord and was willing to forgo regular payments in exchange for access to the refining plant and ir-

regular payments totalling approximately $8,000—circumstances that tended to show that petitioner had a financial stake in the success of the fraudulent scheme. Petitioner maintained that he had no knowledge of the fraud and that he had simply been paid $100 to demonstrate the Henderson process. Pet. App. A4.

Petitioner's Section 2255 motion asserted five grounds on which his trial counsel was ineffective, only three of which he continues to press in his petition for a writ of certiorari (Pet. 13 n.5).[1] The first allegation was that counsel failed to consult adequately with petitioner prior to and during trial and in connection with the appeal. The court of appeals rejected this claim on the basis of the magistrate's and district court's findings that counsel had devoted approximately 190 hours to pretrial preparation and 17 hours to consultation with petitioner and that petitioner had acknowledged that counsel was diligent. Pet. App. A6-A7, C4, D3. The second allegation was that counsel had failed adequately to investigate, research and prepare the defense case for trial. The court of appeals also rejected this claim, noting that counsel had accumulated a thick file of legal research, filed numerous pretrial motions, and successfully moved to have petitioner released on his own recognizance. Pet. App. A7.

The two opinions below and the magistrate's findings are addressed primarily to petitioner's third claim: that counsel failed to contact and call certain potential fact and character witnesses. The two prin-

[1] Petitioner apparently has abandoned his claims, rejected by the courts below (Pet. App. A7, C2-C3, D3), that counsel failed to call adequate attention to his impressive military career and that counsel embarrassed petitioner before the court.

cipal fact witnesses were Micky Cox and Harvey Stowers.[2] According to defense counsel's notes, Cox would have testified that petitioner had advised Cox against investing in the Henderson process because of its speculative nature. Counsel had subpoenaed Cox, but he did not appear at trial and petitioner himself waived Cox's presence in open court, stating that his testimony would not be necessary. Pet. App. A8-A9, C4-C5, D4-D5. Stowers, according to his affidavit, would have testified that he did work for petitioner and was paid for labor and materials. This testimony, it was claimed, would have supported petitioner's contention that the monies he received from McCord were used to cover legitimate business expenses rather than as payment for petitioner's participation in the scheme to defraud. Counsel testified, however, that petitioner failed to supply her with information regarding Stowers' whereabouts and that her efforts to locate him were futile. She requested that a subpoena be issued to compel Stowers' presence but later withdrew that request because she decided to use the limited number of government-funded subpoenas to obtain the presence of witnesses whose testimony she regarded as more important. Pet. App. A9-A11, C5-C6, D6-D8.

The court of appeals rejected petitioner's claim of ineffective assistance with respect to the failure of Cox and Stowers to testify (Pet. App. A8-A11). It agreed with the district court's conclusion that counsel took reasonable steps to secure the presence of Cox and that counsel "cannot be faulted for the default of an errant witness" (*id.* at A8 (quoting Pet. App.

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[2] The magistrate recommended that petitioner be granted habeas corpus relief on the basis of counsel's failure to call these two witnesses (Pet. App. C4-C6).

D6)). The court of appeals also found that petitioner had failed to make a showing that prejudice resulted from Cox's absence. Petitioner had not produced either Cox or Cox's affidavit of what his testimony would have been, and the court found petitioner's own speculations on the point insufficient to establish a prima facie showing of prejudice. In this regard, the court stressed that petitioner's contention that he was prejudiced by the absence of Cox's testimony rested on "intrinsically shaky ground," since the jury might well have wondered why, if petitioner attempted to dissuade Cox from investing in the Henderson process, he did not give the same advice to other potential investors. Pet. App. A9.

With respect to Stowers' failure to testify, the court of appeals noted that counsel had testified in the instant Section 2255 proceedings that petitioner did not supply her with information on Stowers' whereabouts and that her own attempts to locate Stowers proved futile. Moreover, counsel had decided that Stowers' testimony would have been cumulative to the testimony she planned to elicit from McCord and petitioner to explain the purpose of the checks McCord issued to petitioner, and the court of appeals held that the district court's holding that this was an informed tactical choice was not clearly erroneous. The court of appeals further concluded that even if counsel were unreasonably mistaken in her estimation of the supposed scope of Stowers' testimony, petitioner had failed to show any substantial prejudice as a result. The court noted in this regard that McCord and petitioner had "laboriously explained the source and purpose of each check [petitioner] received" (Pet. App. A10), thereby indicating that Stowers' testimony would have been cumulative, and that the force of Stowers' testimony would have been under-

mined by his statement that when the cash flow faltered, he and petitioner renegotiated his compensation plan with the assurance that Stowers would share a portion of the eventual gain from the project. In the court of appeals' view, this testimony would have supported rather than weakened the inference the government urged: that petitioner expected to realize a share in the fruits of the fraud and was willing to make initial sacrifices disproportionate to any profit-sharing arrangement for legitimate sales of silver. Pet. App. A9-A11.

ARGUMENT

Petitioner contends (Pet. 9-23) that the court of appeals erred in declining to set aside his conviction on the ground of ineffective assistance of counsel. This contention is without merit. Petitioner's trial counsel was an experienced criminal defense attorney who had handled more than 200 criminal cases prior to representing petitioner, and she devoted many hours to researching the law and other matters relating to the case, consulted extensively with petitioner, and developed a defense strategy. Pet. App. A11. Petitioner maintains, however, that counsel nevertheless was ineffective because she failed to call certain witnesses—particularly Cox and Stowers—to testify. However, this Court's recent decision in *Strickland* v. *Washington*, No. 82-1554 (May 14, 1984), makes clear that the court of appeals correctly rejected this argument. Counsel's conduct plainly did not deprive petitioner of a fair trial by "so undermin[ing] the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland* v. *Washington*, slip op. 16. Further review of this fact-bound claim therefore is not warranted.

Petitioner has failed to satisfy either prong of the two-part test announced in *Strickland* for establishing ineffective assistance of counsel: (1) that counsel made errors so serious that she was not functioning as the "counsel" guaranteed by the Sixth Amendment, and (2) that counsel's deficient performance in turn deprived the defendant of a fair trial and a reliable result (slip op. 17).

1. With respect to the first prong of the two-part inquiry required by *Strickland*, petitioner has wholly failed to overcome the "strong presumption" that counsel's conduct fell within the wide range of reasonable professional assistance and that counsel made all significant decisions in the exercise of reasonable professional judgment (slip op. 19-20). See also *United States* v. *Cronic*, No. 82-660 (May 14, 1984), slip op. 10 & n.23. The courts below both concluded that counsel could not be faulted for the failure of Cox, the errant witness, to appear at trial (Pet. App. A8, D6), and this conclusion was clearly correct. Cox was served with a subpoena four days prior to trial, and although he thereafter talked to petitioner, he never gave any indication that he would not appear. Counsel then attempted to locate Cox when he did not appear as scheduled. Although counsel conceivably might have sought a continuance to secure Cox's attendance, the courts below found it unlikely that such a motion would have been granted since Cox could not be located, and petitioner in any event then waived Cox's presence in open court, informing counsel and the court that Cox's testimony would not be necessary. Pet. App. A8, D6. This Court has made clear that the reasonableness of counsel's actions is reinforced where, as here, they are the product of such informed strategic choices made by the defendant or information supplied by him. *Strickland* v. *Washington*, slip op. 20-21.

There likewise is no basis for concluding that counsel's actions with respect to Stowers were outside the broad range of acceptable professional competence. As an initial matter, counsel testified at the Section 2255 hearing that petitioner failed to furnish her with information on Stowers' whereabouts and that her own attempts to locate him were unsuccessful. Cf. *Strickland* v. *Washington*, slip op. 20-21. Moreover, although counsel originally requested that Stowers be subpoenaed to appear, she subsequently withdrew that request in order to use her limited number of government-funded subpoenas for witnesses whom she regarded as more important. This was because counsel had decided that Stowers' testimony would simply have been cumulative to testimony that McCord and petitioner himself would give. The court of appeals affirmed the district court's finding that counsel had made an "informed tactical choice" in this regard (Pet. App. A10), and this Court stressed in *Strickland* that such "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable" (slip op. 20). Petitioner has made no colorable showing that counsel's decision here with regard to what the district court termed Stowers' "tangential" testimony (Pet. App. D7) falls within any exception to that general rule.[3]

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[3] Petitioner also faults (Pet. 18-21) counsel for not calling certain other witnesses, principally character witnesses, noting that 16 affidavits were presented in district court on this point. The district court observed, however, that counsel testified that it was impossible for her to locate most of those witnesses because when petitioner actually furnished information regarding their whereabouts, it was inconsistent or unhelpful. Moreover, of the 16 witnesses who submitted affidavits, three (Dr. Key, McCord and petitioner) did testify at

2. Even if petitioner were correct that counsel's actions with respect to Cox and Stowers fell outside the range of professional competence, the court of appeals nevertheless correctly denied relief because petitioner has not shown that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, slip op. 24.[4] Indeed, the court of appeals concluded that the testimony of Cox and Stowers might actually have harmed petitioner's case. The court reasoned that Cox's testimony (assuming that petitioner's speculation about what it would have been was credited) might have caused the jury to wonder why petitioner had not sought to dissuade others from investing in the fraudulent scheme as he allegedly tried to dissuade Cox. And the court rea-

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trial; counsel purposely eliminated a fourth for tactical reasons; and a fifth, Merwin White, in fact was subpoenaed but failed to appear. Of the remainder, all but one of the character witnesses were out of state at the time of trial, and a great majority indicated that they had not been in close contact with petitioner for 10 to 20 years. Moreover, counsel knew that petitioner himself had made arrangements for one character witness to be available on a standby basis, but that witness also did not appear. The district court therefore correctly rejected a claim of ineffectiveness based on these additional witnesses. Pet. App. D9-D10 & n.2.

[4] Petitioner argues (Pet. 9-12) that the court of appeals erroneously focused on "physical indicia" of counsel's diligence—*e.g.*, the 190 hours she devoted to the case, her filing of numerous pretrial motions, and her development of an extensive case file—rather than counsel's actual effectiveness. This argument is misplaced. The court of appeals discussed these factors only in addressing petitioner's generalized assertion that counsel did not adequately prepare for trial or consult with him (Pet. App. A6-A7). The court of appeals separately addressed petitioner's contentions regarding counsel's failure to call certain witnesses (*id.* at A8-A11).

soned that Stowers' testimony regarding his receipt of payments from petitioner would have been cumulative to McCord's and petitioner's own explanation of the source and purpose of each check petitioner received and, in addition, that certain portions of Stowers' testimony would have supported rather than weakened the government's theory that petitioner expected to realize a share in the fruits of the fraud. Pet. App. A9, A10-A11; see pages 5-6, *supra*. There thus is no basis here for believing that Cox's and Stowers' testimony would have created a reasonable doubt about petitioner's guilt or, accordingly, that counsel's conduct should undermine our confidence that a "just result" was reached. *Strickland*, slip op. 16-17, 24-25, 30.[6]

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[6] Petitioner's contention (Pet. 21-23) that the court of appeals erroneously used an "outcome determinative" test in rejecting his claim of prejudice is without merit. The court of appeals stated that there must be "some actual, adverse impact upon the fairness of his trial resulting from [counsel's] lapse" (Pet. App. A6, quoting *Boyd* v. *Estelle*, 661 F.2d 388, 389-390 (5th Cir. 1981))—a formulation that is consistent with the focus of this Court in *Strickland* on the fairness of the proceedings (slip op. 16-17). Although the court of appeals did observe that petitioner had failed to show that Cox's testimony "would have substantially altered the outcome of the trial" (Pet. App. A9), we understand that observation, in context, to mean only that Cox's testimony would have had an insubstantial impact on the jury's deliberations, especially since the court stressed that petitioner's argument about Cox's testimony was "intrinsically shaky" (*ibid.*). Moreover, the panel of the Fifth Circuit in this case explicitly stated that it was following the prior en banc decision of the Fifth Circuit (now the Eleventh Circuit) in *Washington* v. *Strickland*, 693 F.2d 1243 (1982), rev'd, No. 82-1554 (May 14, 1984). See Pet. App. A6. There the Fifth Circuit rejected an outcome determinative test and required a lesser showing of prejudice to the presentation of the defense. 693 F.2d at 1258.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

FRANCIS J. MARTIN
Attorney

MAY 1984

Against this background, the court below cannot be assumed to have reviewed the prejudice element under a standard that was even *less* favorable to the defendant than that articulated by this Court in reversing the Fifth Circuit's decision in *Strickland*.

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